LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 16 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-85

DEWEY M. RUMFELT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

WILLIAM W. SCHOOLEY
2038 Edison Avenue
Granite City, Illinois 62040

LANCE CALLIS
1326 Niedringhaus Avenue
Granite City, Illinois 62040
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

DEWEY M. RUMFELT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Dewey Rumfelt respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit which was rendered on June 15, 1971.

OPINIONS BELOW

The District Court for the Eastern District of Illinois entered judgment of the jury verdict entered in favor of the United States of America. The United States Court

of Appeals for the Seventh Circuit affirmed in an opinion not yet reported, a copy of which may be found as an appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was rendered on June 15, 1971. No petition for rehearing was filed. The jurisdiction of this Court is invoked under the Act of June 25, 1948, Chapter 646, 62 Stat. 929, 28 U.S. C.A. 1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether the Court's instruction to the jury setting forth the elements required to be proved in order to establish an offense charged in the indictment denies due process to the defendant when the elements set forth are completely alien to the crime charged in the indictment and the evidence produced at trial.

STATEMENT OF THE CASE

The pertinent facts required to support the Petitioner's Writ of Certiorari are as set out in the opinion of the United States Court of Appeals for the Seventh Circuit, as follows:

> "Alto Pass, Illinois, is a small town. Among the buildings are a small grocery store and a small bank (Farmers State Bank) which are located adjacent to each other on the main street.
>
> On February 29, 1968, witness John D. Aldrich left the grocery store about 1 P.M. intending to drive his automobile truck which had been parked in front of the store. As he neared his truck, he saw a masked man with rifle in hand standing beside an automobile

parked near the truck and in front of the bank. Aldrich testified the masked man pointed the rifle at him and said 'get in the bank.' They both walked toward the bank and Aldrich attempted to open the door but discovered it was locked. Aldrich told the masked man he could not get into the bank and the masked man who was standing a short distance behind him came up to the building and looked in the window. He then told Aldrich to get out of town, and Alrich got into his truck and left town."

The person wearing a mask then entered the 1964 Oldsmobile and left town.

The indictment was brought under Title 18 U.S.C., Sec. 2113 (a) which provides as follows:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny . . .

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

The indictment brought by the grand jury and read to the jury provides as follows:

"THE GRAND JURY CHARGES:

On or about February 29, 1968, in Alto Pass, Illinois, within the Eastern District of Illinois, the defendant, DEWEY M. RUMFELT, did knowingly, wilfully and unlawfully attempt to enter the Farmers State Bank, a banking institution, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with the intent to commit in said bank a felony affecting said Farmers State Bank, to wit, to take therefrom money which was in the care, custody, control, management and possession of said bank; all in violation of Section 2113(a), Title 18, United States Code."

The Court's instruction number Four given over objection by defense counsel provides as follows:

"Three essential elements are required to be proved in order to establish the offense charged in the indictment.

FIRST: The act or acts of taking or attempting to take, from the person or presence of another, money belonging to or in the care, custody, or control, management or possession of a bank, as charged;

SECOND: The act or acts of taking or attempting to take such money by force or violence, or by means of intimidation;

THIRD: Doing such acts knowingly, wilfully and unlawfully.

As stated before, the burden is always on the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence."

ARGUMENT

The first paragraph of Title 18, U.S.C., Section 2113 (a) establishes a crime defined as the attempt to take a thing of value by intimidation from a person or presence of another. The second paragraph in the disjunctive establishes a crime defined as the attempt to enter a building used as a bank. The word intimidation is not used in the second paragraph.

The indictment under which the defendant was brought to trial charges the defendant with the crime of attempting to enter a bank pursuant to the second paragraph of the statute. The instruction of the Court charges the jury with the essential elements to convict as set forth under the first paragraph of the statute.

The evidence presented at trial does not show that there was an attempt by intimidation to take anything of value belonging to the bank from the presence of another. The intimidation as shown by the evidence was directed toward a stranger who happened to be on the street.

The petitioner has been denied due process by use of the court's instruction No. 4 in the following respects:

(1) The court has broadened the crime established by Congress to include the use of intimidation upon a person as an attempt to enter into a bank.

(2) The Court removed the issue of an actual attempt to enter a bank from consideration by the jury. The question of an actual attempt to enter the building is a close question in this case. The jury could well have believed that the intimidation of a stranger in the vicinity of a bank was an attempt to enter the bank.

CONCLUSION

In conclusion we believe that because the District Court so inaptly misapplied the provision of the statute, the petitioner was denied due process under the law.

Respectfully submitted

.....

WILLIAM W. SCHOOLEY
2038 Edison Avenue
Granite City, Illinois 62040

.....

LANCE CALLIS
1326 Niedringhaus Avenue
Granite City, Illinois 62040
Attorneys for Petitioner

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM 1970—APRIL SESSION 1971

No. 18219

DEWEY M. RUMFELT, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Eastern District of Illinois.

June 15, 1971

Before DUFFY, *Senior Circuit Judge,* STEVENS, *Circuit Judge* and CAMPBELL, *Senior District Judge.*[1]

DUFFY, *Senior Circuit Judge.* Defendant (appellant) was convicted of attempted bank robbery in violation of Title 18 U.S.C. § 2113(a) which statute provides, in part: "Whoever . . . attempts to enter any bank[2] . . . or any

[1] Senior District Judge Campbell is sitting by designation.

[2] 18 U.S.C. § 2113(f) provides: "As used in this section the term 'bank' means any member bank of the Federal Reserve System . . . and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

building used in whole or in part as a bank . . . with intent to commit in such bank . . . any felony affecting such bank . . . shall be fined not more than $5,000 or imprisoned not more than twenty years or both."

Alto Pass, Illinois, is a small town. Among the buildings are a small grocery store and a small bank (Farmers State Bank) which are located adjacent to each other on the main street.

On February 29, 1968, witness John D. Aldrich left the grocery store about 1 p. m. intending to drive his automobile truck which had been parked in front of the store. As he neared his truck, he saw a masked man with rifle in hand standing beside an automobile parked near the truck and in front of the bank. Aldrich testified the masked man pointed the rifle at him and said "get in the bank." They both walked toward the bank and Aldrich attempted to open the door but discovered it was locked. Aldrich told the masked man he could not get into the bank and the masked man who was standing a short distance behind him came up to the building and looked in the window. He then told Aldrich to get out of town, and Aldrich got into his truck and left town.

Aldrich described the car which the masked man was using as a '64 model Oldsmobile with a dark top and a slightly lighter body.

State Trooper Draves, who had been a State Trooper for fourteen years, testified that on the same February 29, 1968 afternoon, when he was on patrol, he received a radio dispatch in response to which he proceeded east on Route 3, a gravel one-way road. Draves came to a "T" intersection and turned north.

Shortly thereafter, Draves saw a "black over gray" 1964 Oldsmobile approaching him at a high speed going

south. Draves thought that the coming car matched the description given in the radio dispatch. The testimony is that the Oldsmobile passed Draves within a distance of about thirty feet. Draves testified that as the driver of the Oldsmobile was passing, he (the driver) "reached over with his right hand and picked up what appeared to be an army carbine off the front seat by him, braced over to the front, the clip facing upwards and pointed it in his general direction." Draves identified defendant (appellant) Rumfelt as the man who was driving the Oldsmobile.

Trooper Draves made a "U" turn and followed defendant's car at a high rate of speed. After covering about two miles, Draves saw the defendant running from the car into a woods, and noted he was carrying a carbine.

Draves made an examination of the contents of the Oldsmobile and found a 1964 Missouri license plate, a brown corduroy jacket and a gold ski mask.

A short while later, and after making contact with a police aircraft, Trooper Draves saw defendant Rumfelt emerging from the woods, clad in a green checkered shirt and wash pants. He was placed under arrest at that time.

Trooper James Turner and Illinois State Police Investigator Reincke began a search of the same woods with a German Shepherd tracking dog. The dog found fresh tracks and led them to a pair of overalls and a blue sweat shirt before losing the scent. After returning to the abandoned Oldsmobile and giving the dog a scent from the ski mask which was found there, the dog led them to a suitcase which contained some clothing, assorted personal toilet items, a letter addressed to Rumfelt and a medication bottle with a prescription made out to Rumfelt. The letter and bottle were introduced into evidence at trial.

The woods in question was surrounded on three sides by water. On the first tracking on February 29th, the dog

led the State Troopers to a certain point leading off into the water. The next day, State Troopers returned to this same spot and eventually uncovered an M-1 carbine, a .22 caliber pistol, two clips of ammunition, binoculars in a case, and a belt all in the water. The Government marked these items and attempted to introduce them at trial, but the Court did not admit these items even though witness Aldrich had testified that the man who accosted him had a gun that looked like Government Exhibit 11 (the pistol), and Trooper Draves testified that the man who had passed him in the Oldsmobile had a carbine in his hands.

Defendant contends that the testimony in this case does not establish proof of the act of attempted entry of a bank with intent to commit a felony as charged in the indictment. We disagree.

We recognize, of course, that "Much ink has been spilt in an attempt to arrive at a satisfactory standard for telling where preparations end and attempt begins", *Mims v. United States,* 375 F.2d 135 (5 Cir., 1967). We note also that "The classical legal elements of an attempt are the intent to commit a crime, the execution of an overt act and a failure to consummate the crime", *United States v. Baker,* 129 F. Supp. 684 (1955), and that "preparation alone is not enough, there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature . . .", *People v. Buffum,* 40 Cal. 2d 709, 256 P.2d 317.

We feel that enough evidence was submitted for the jury to find that an attempt under the statute had been made in the present case. We do not deem fatal the fact that defendant never actually entered the Farmers State Bank.

As we have stated on several occasions, an actual entry is not required under the statute. "Rather, the heart of the crime is the intent to steal." *United States v. Schaar,* 437 F.2d 886, 887 (7 Cir., 1971). Pertinent also is the Supreme Court's language in *Prince v. United States,* 352 U.S. 322, 326 (1957) that a person ". . . need only attempt to enter with 'intent to commit in such bank or building thereof any felony or larceny.'" Clearly, the jury could find that such an intent existed here and that the requisite overt acts had been committed toward that end. The presence of defendant in front of the bank clad in a mask, along with his use of a carbine to intimidate a hostage, and the use of that hostage in an effort to get inside of the bank were all facts which would support that finding.

Defendant's second contention is that Trooper Drave's identification of defendant as the man in the 1964 Oldsmobile was so incredible as to be insufficient as a matter of law without corroboration. In brief, defendant argues that no positive identification was possible in the few seconds which elapsed while the Oldsmobile was passing Draves' car.

It was, of course, a matter for the jury as to whether the testimony of Trooper Draves was credible or incredible. Certainly, there was nothing inherently incredible as to his testimony. Furthermore, it is well established that this Court must consider the evidence in the light most favorable to the Government. *United States v. Reed,* 329 F.2d 865 (7 Cir., 1968). Moreover, we note that the testimony of Deputy Sheriff Kelly tends to corroborate Draves' testimony and that on the afternoon of February 29, defendant was the only person seen coming out of the woods which was surrounded on all other sides by water.

Defendant next argues that the Government's attempt to admit the carbine and pistol was prejudicial error. In

effect, defendant accuses the Government of bad faith in offering two weapons into evidence. The record indicates that while the two weapons were shown to witnesses, they were not displayed to the jury. From the record, we are convinced that the jury could have inferred from the uncontradicted evidence that the weapons found under the ice at the point where the dog lost defendant's scent, were the property of the defendant. However, neither weapon was admitted in evidence, and we think there was no reversible error in this respect, nor was any bad faith on the Government's part shown which would warrant reversal.

Nor do we think that any error was committed by the trial court in admitting the ski mask, the brown jacket, the letter and the medicine bottle into evidence. These items were connected to defendant through the qualified tracking dog and by the positive identifications of the trooper.

Finally, we come to defendant's contention that prejudicial error was committed by the trial judge when he asked certain questions of some witnesses. Most particularly, defendant objects to the judge's questioning of F.B.I. Agent Graper regarding fingerprints on the 1964 Oldsmobile. On cross-examination, Graper testified that no identifiable fingerprints could be found on the vehicle. The Court then questioned Agent Graper regarding latent fingerprints, and at one point asked: "So are we to understand that there were latent fingerprints on the automobile, on the '64 Oldsmobile, but that none were identifiable because they were either overlays or smudged?" Graper replied: "That is correct, your Honor." Defendant contends that this line of questioning led the jury to believe that the Court had formed an opinion on an issue properly for the jury.

The matter of a trial judge's questioning of witnesses is quite sensitive, as we indicated in *United States v.*

Knaack, 409 F.2d 418 (7 Cir., 1969). However, we do not believe that any reversible error was committed by the trial judge in the present case. The questions were not extensive. Moreover, they were accompanied by a lengthy cautionary instruction.

We have reviewed defendant's other contentions and find them to be without merit.

The judgment of conviction is

AFFIRMED

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-85

DEWEY M. RUMFELT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Eastern District of Illinois, petitioner was convicted of attempting to enter a federally insured bank, in violation of 18 U.S.C. 2113(a). He was sentenced to imprisonment for eight years. The court of appeals affirmed (Pet. App.).

At about 1:00 p.m. on February 29, 1968, one John Aldrich, as he was leaving a grocery store in Alto Pass, Illinois, was confronted by a masked man standing near a 1964 Oldsmobile in front of the bank next door. The man, who was wearing two jackets and a ski mask, pointed a "rifle" at Aldrich and told him, "Get in the bank." Aldrich walked to the bank door and

443-115—71

tried to open it, but it was locked for the lunch hour. The man moved around behind Aldrich and looked in the bank window; he then told Aldrich to get out of town. Aldrich did so but, before leaving, he told someone to call the police (Tr. 2–4).[1]

Shortly thereafter, a state trooper, who learned of the occurrence over the car radio, saw a 1964 Oldsmobile approaching him at a high rate of speed about ten and a half miles outside of Alto Pass. The trooper pulled to the side of the road; as the approaching car drew abreast, the driver reached to his right and picked up a carbine, which he pointed in the general direction of the trooper. The trooper got a full view of the face of the man, whom he identified as petitioner, and immediately made a U-turn and followed the Oldsmobile (Tr. 36–40).

Approximately two miles down the road, petitioner suddenly brought his car to a stop on the right shoulder; the trooper saw him run into a nearby woods, carrying the carbine. A corduroy jacket and a ski mask were left behind in the abandoned car (Tr. 40–45). The trooper called for assistance, and the woods, which were surrounded on three sides by water, were searched by other officers and observed by a police airplane. About three or four o'clock that afternoon, petitioner emerged from the woods approximately one quarter of a mile from the abandoned Oldsmobile and was placed under arrest (Tr.

[1] "Tr." refers to the transcript of proceedings in the trial court, a copy of which is being lodged with the Clerk of this Court.

82–85). Aldrich testified at trial that the firearm, the jacket and mask and the car were similar to those he had observed when confronted outside the bank (Tr. 4–5, 12–13).

Petitioner contends here that the trial court erred in giving the following instruction to the jury (Tr. 160–C):

> Three essential elements are required to be proved in order to establish the offense charged in the indictment.
>
> First: The act or acts of taking or attempting to take, from the person or presence of another, money belonging to or in the care, custody, or control, management or possession of a bank, as charged;
>
> Second: The act or acts of taking or attempting to take such money by force or violence, or by means of intimidation;
>
> Third: Doing such acts knowingly, wilfully and unlawfully.
>
> As stated before, the burden is always on the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.[2]

---

[2] An instruction in substantially this form was offered by the government (Tr. 149–150). The following colloquy with regard to this proposed instruction took place (Tr. 151):

> Mr. Schooley. This particular instruction, your Honor, is not in keeping with the indictment as drafted. The indictment alleges he unlawfully attempted to enter the Farmers State Bank with the intent to commit a felony, to-wit, to take money therefrom. The instruction sets out the act or acts of attempting to take, from the person or presence of another, money belonging to or in the care,

The argument was not made in the court of appeals [3] and therefore is not properly before this Court. At all events, the claim is insubstantial in the circumstances of this case and does not warrant further review by this Court.

1. Petitioner asserts that the quoted instruction is adapted to prosecutions under the first paragraph of Section 2113(a), proscribing the taking, or attempted taking, of money from a bank "by force and violence, or by intimidation," whereas he is charged only with violating the second paragraph of that section, proscribing entry, or attempted entry into a bank "with intent to commit * * * any felony" therein. Whatever the merit to petitioner's argument, however, it is plain on the record of this case that use of this instruction by the court, even if technically erroneous, was not in any way prejudicial to petitioner. See *Kotteakos* v. *United States*, 328 U.S. 750; cf. *Chapman* v. *California*, 386 U.S. 18, 24.

---

custody, or control, management or possession of a bank. The third element is: "Doing such acts wilfully." It should be, "knowingly, wilfully and unlawfully."

Mr. ARBETMAN. Your Honor, this instruction sets out the elements as defined in the statute.

The COURT. The indictment says, "knowingly, wilfully and unlawfully." Do you think that needs to be put in here?

Mr. ARBETMAN. We would have no objection to that.

The COURT. I am amending that by making it, "Doing such acts knowingly, wilfully and unlawfully."

Mr. SCHOOLEY. I still have the same objection to the first part.

[3] In the court of appeals, petitioner urged insufficiency of the evidence to support his conviction and raised several trial errors. His contentions were fully answered by the court below (Pet. App. A4–A7) and have not been reasserted in this petition.

Petitioner was charged with "knowingly, wilfully and unlawfully attempt[ing] to enter Farmers State Bank * * * with the intent to commit * * * a felony * * * to wit, to take therefrom money which was in the care, custody, control, management and possession of said bank; all in violation of Section 2113(a), Title 18, United States Code" (Pet. 4). As this Court stated in *Prince* v. *United States,* 352 U.S. 322, 328: "The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal." See also *United States* v. *Schaar,* 437 F. 2d 886 (C.A. 7).

Under the trial court's instruction, the jury admittedly was advised that to return a verdict of guilty it must find first that petitioner attempted to take money from the bank, not that he attempted to enter the bank with the intent to take money. But, to find the former—as the jury apparently did in this case—necessarily required a finding that petitioner had the requisite intent with respect to the latter.

Here, the evidence of petitioner's intent to steal was abundant. He was standing outside the bank, armed and masked, at the time that Aldrich came out of the grocery store next door. On seeing Aldrich, petitioner turned his gun on him, apparently considering that his efforts would be jeopardized if Aldrich were free to sound an alarm, and ordered Aldrich to "get in the bank" (Pet. App. A2). On finding that the bank door was locked, petitioner instructed Aldrich to get out of town. He then jumped into his Oldsmobile and drove

off at a high rate of speed. When the police gave chase, petitioner pulled off the road and fled on foot into a nearby woods, still carrying the gun he had used on Aldrich. From these facts, the jury could properly conclude that petitioner had the intent to commit armed robbery of the bank required by the statute, even if we assume *arguendo* that it could not have found that his actions were sufficient to constitute an actual attempt to take bank money.

It is argued, however, that the language used by the trial court to explain the second element of an offense under paragraph 1 of Section 2113(a)—*i.e.*, attempting to take such money by force or violence, or by means of intimidation—misled the jury to believe that proof of petitioner's intimidation of Aldrich (a stranger) would alone be sufficient to show "an attempt [by petitioner] to enter the bank" (Pet. 5). Had petitioner merely turned his gun on Aldrich and directed him to leave town silently if he didn't want to be shot, we would tend to agree with petitioner; such intimidation would clearly not be adequate evidence of an attempted bank entry. But that is not this case. Here Aldrich was specifically ordered to enter the bank and was forced at gun point to attempt to open the bank door. In these circumstances, Aldrich's efforts to get into the bank were legally equivalent to petitioner himself trying to open the door. Thus, the "intimidation" of Aldrich—which is not contested by petitioner—was in this case alone sufficient to establish an attempted entry by petitioner in violation of paragraph 2 of Section 2113(a).

We do not disagree with petitioner that the trial

court's instruction to the jury in this case improperly focused on the wrong paragraph of Section 2113(a). The court's use of the word "intimidation," however, simply imposed an additional burden on the government not required by the indictment, which charged petitioner only with an attempt to enter the bank with unlawful intent. Since the jury necessarily had to find both elements of the offense charged—*i.e.*, attempted entry and intent to commit a felony—before it could return, under the court's instruction, a verdict of guilty of the charge of attempt to take money in the custody or control of a bank (whether or not by force, violence or intimidation); and since the evidence in this case amply supports the verdict of guilty *as charged*, there is no basis here for a claim of prejudice.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971